UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RICHARD G. HYMAN,

Plaintiff,

-v.-

INTERNATIONAL BUSINESS MACHINES CORPORATION and EMPLOYMENT SOLUTIONS CORPORATION,

Defendants.

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98 Civ. 1371 (JSM)

OPINION and ORDER

PHILIP J. PALESE,

Plaintiff,

-v.-

INTERNATIONAL BUSINESS MACHINES CORPORATION and EMPLOYMENT SOLUTIONS CORPORATION,

Defendants.

----------X

98 Civ. 1372 (JSM)

OPINION and ORDER

JOHN S. MARTIN, Jr., District Judge:

Richard G. Hyman ("Hyman") and Philip J. Palese ("Palese") bring these actions claiming that they were fraudulently induced to leave their jobs at International Business Machines Corp. ("IBM") and join its subsidiary, Employment Solutions Corp. ("ESC"), by false representations of a five-year contract between the two companies. They also bring actions for negligent misrepresentation based on the same statements. IBM moves on behalf of itself and as successor-in-interest to ESC for summary

judgment on both claims. For the reasons set forth below, IBM's motion is granted in part and denied in part.

I. BACKGROUND

In November 1991, IBM determined that rather than serving its staff recruitment needs in-house, it would form a wholly-owned subsidiary, ESC, to perform that function. In February 1992, IBM announced an incentive program, Employment Solutions Transition Program (the "EST Program"), designed to recruit IBM employees to leave IBM and join ESC. The EST Program featured a severance package and a leave-of-absence option during which IBM employee benefits would continue to accrue. Thereafter, certain IBM employees who had been hired to operate ESC, including Lee Covert ("Covert"), began to personally recruit IBM employees for the new venture.

Both Hyman and Palese began their careers at IBM in the 1960s. In 1992, each was employed in a division of IBM handling college recruitment. In March 1992, both Hyman and Palese were approached by Covert for the purpose of recruiting them to work at ESC.

During his conversations with Plaintiffs regarding employment at ESC, Covert represented that ESC had signed a five-year contract with IBM that would ensure ESC's viability for at least that period of time. Plaintiffs claim that similar representations were made by other ESC employees when offers of employment were officially extended to them. Plaintiffs allege

that in reliance on these statements, they resigned their employment at IBM in April 1992 and accepted jobs at ESC. Plaintiffs claim that no such five-year contract had been signed at the time these representations were made, and was never in fact signed. They further allege that Covert and other ESC employees knew, or should have known, that such statements were false when they were made. At the time of their departure from IBM, Plaintiffs both signed a release of all claims they had against IBM.

Plaintiffs each worked at ESC for approximately two years and performed substantially the same functions that they had performed at IBM. In March 1994, Palese's position was terminated when down-sizing caused IBM to drop several of the colleges he serviced. In April 1994, Hyman's position was terminated when IBM reversed course and decided to dissolve ESC and return its recruiting outfit to in-house management. Both plaintiffs remained out of work for several months before obtaining positions elsewhere.

Plaintiffs allege that as a result of leaving IBM, they suffered lost base salary, lost vacation pay, lower pension accumulation, and lost matching contributions to savings plans, among other injuries. They also allege that at the time of their departure from IBM, that company had in place a full employment policy providing that in the event a position was terminated, the employee would be reassigned to another area in the company.

Plaintiffs were at-will employees of both IBM and ESC.

II. DISCUSSION

A. The Releases

IBM argues that the releases that Plaintiffs signed upon leaving IBM's employ bar them from suing either IBM or ESC. The release's own language, however, defeats this argument. The release bars suit against IBM and its "agents, directors, officers, employees, representatives, successors and assigns" for any claims that Plaintiffs may have, including those relating to the termination of their employment. Popper Decl. Exs. A, B.

ESC, as a subsidiary of IBM, is not covered by the language of the release, broad though it may be. Plaintiffs' claims are directed at Covert and others who acted as agents of ESC, although they were also employed by IBM at the time. Thus, to the extent that Plaintiffs' allegations concern ESC and its agents, they fall outside the four corners of the release. Indeed, IBM is being sued here only in its capacity as successor-in-interest to ESC. There is nothing in the language of the release that can justify extending it to claims against later-created subsidiaries.[1]

B. Fraudulent Inducement Claims

IBM next argues that Plaintiffs' fraudulent inducement

[1] The statements Plaintiffs signed to the effect that in leaving IBM they had not relied on any promises except those contained in the EST Program materials also pertains to statements of IBM employees, as IBM was the entity to which the releases applied.

claims are barred by the at-will employment doctrine. Under New York law, at-will employees cannot recover for wrongful termination, nor can they evade this bar by suing in tort. See Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 297, 300-02 (1983); Ullmann v. Norma Kamali, Inc., 616 N.Y.S.2d 583, 584 (App. Div. 1994). In addition, plaintiffs cannot masquerade a breach of contract claim as a fraud claim. See Saleemi v. Pencom Sys., Inc., No. 99 Civ. 667, 2000 WL 640647, at *4-5 (S.D.N.Y. May 17, 2000). At-will employees can, however, recover for fraudulent statements that induce them into accepting positions of employment by showing: (1) a material false representation; (2) scienter; (3) reasonable reliance; (4) damages; and, relevant here, (5) that the fraudulent misrepresentation was collateral or extraneous to the employment agreement. See Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 19-20 (2d Cir. 1996); Stewart v. Jackson & Nash, 976 F.2d 86, 88-90 (2d Cir. 1992).

Plaintiffs have successfully pleaded a cause of action for fraudulent inducement. Plaintiffs do not seek to recover for their termination from ESC and its consequent impact on their careers and pocketbooks, but rather allege that they were induced to leave secure positions at IBM by the defendants' false representations, and that this inducement led to injuries stemming from the act of resigning from IBM. In Stewart v. Jackson & Nash, the Second Circuit Court of Appeals found that

the plaintiff stated a claim for fraudulent inducement where she alleged that she changed employment in reliance on false promises regarding the nature of the defendant's law practice and her duties there. 976 F.2d 86, 88 (2d Cir. 1992). The court found that the Stewart plaintiff's injuries, which involved damage to her career growth, "commenced well before her termination and were, in several important respects, unrelated to it." Id. at 88.

Courts since Stewart have allowed claims for fraudulent inducement where the injury alleged stems from leaving a former place of employment or agreeing to remain in a compromised position at a current place of employment, rather than from the termination or failure to perform terms of the employment agreement. See, e.g., Doehla v. Wathne Ltd., No. 98 Civ. 6087, 2000 WL 987280, at *5-6 (S.D.N.Y. July 17, 2000); Caron v. The Travelers Corp., No. 96 Civ. 6236, 1998 WL 395319, at *3-5 (S.D.N.Y. July 15, 1998); Kissner v. Inter-Continental Hotels Corp., No. 97 Civ 8400, 1998 WL 337067, at *3 (S.D.N.Y. June 25, 1998); Cole v. Kobs & Draft Adver., Inc., 921 F. Supp. 220, 224-26 (S.D.N.Y. 1996); Garnier v. J.C. Penney Co., 863 F. Supp. 139, 140-41, 143 (S.D.N.Y. 1994); see also Navaretta v. Group Health, Inc., 595 N.Y.S.2d 839, 841 (App. Div. 1993).

IBM attempts to distinguish Stewart and its progeny by arguing that those cases require a qualitative injury relating to the employee's experience at the new place of employment, such as affirmative damage to career growth or reputation. IBM asserts

that Hyman and Palese performed their jobs successfully at ESC and suffered no actual injury until their termination from that company. However, the Stewart court used a straightforward fraud analysis in distinguishing the plaintiff's claim from one arising from the job termination itself, requiring only that the injury be separate and apart from the loss of a job. It so happened that the Stewart plaintiff's injuries were in the nature of damage to her career advancement, while Plaintiffs' injuries arise from loss of security and other benefits attendant to continued employment at IBM.[2]

In addition to articulating an overall theory of fraudulent inducement, Plaintiffs have raised material issues of fact as to each of the elements of that cause of action. First, Plaintiffs have alleged that in reliance upon the statements of Covert and others that a five-year contract was in place between IBM and ESC, they resigned their employment at IBM and accepted positions at ESC. IBM concedes that such representations were made. Plaintiffs have raised triable issues of fact as to whether a five-year contract ever existed and as to whether those representations were material in causing Hyman and Palese to resign from IBM.

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[2] In addition, while several cases following Stewart have involved injury similar to that of the Stewart plaintiff, no court has held that damage to career growth and reputation are the only permissible injuries in an at-will employee's fraudulent inducement action.

Second, Plaintiffs allege that Covert and other agents of ESC knew, or should have known, that there was no five-year contract in place at the time that they represented its existence to Plaintiffs. Plaintiffs' supporting affidavits raise a question of fact as to whether this was so.

Third, IBM argues that Plaintiffs, as at-will employees, could not reasonably rely on a representation of secure job employment. This assertion might be correct if Plaintiffs were challenging their termination from ESC. However, the measure of reliance here centers on the representation of a five-year contract that induced Plaintiffs to leave IBM, not on whether Plaintiffs would in fact be employed at ESC for five years. Whether reliance on such representations was reasonable is a question of fact.

Fourth, damages in fraud actions are limited to out-of-pocket losses incurred as a direct result of the misrepresentation. See Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 421 (1996). While IBM argues that Plaintiffs have in fact suffered no losses due to their subsequent earnings and severance packages, such determinations are appropriately made by the finder of fact. In addition, although Plaintiffs were at-will employees of IBM, damages can be measured based on how long they likely would have remained at IBM. See Caron, 1998 WL 395319, at *5; Navaretta, 595 N.Y.S.2d at 841.

Finally, the representations of a five-year contract between

IBM and ESC were separate and apart from Plaintiffs' offers of employment or the terms of the offers. As such, those statements were "collateral or extraneous" to the employment contract itself. See Bridgestone/Firestone, 98 F.3d at 20; Tannehill v. Paul Stuart, Inc., 640 N.Y.S.2d 505, 506 (App. Div. 1996).

Thus, Plaintiffs have properly pleaded a cause of action for fraudulent inducement, and have met their burden in raising triable issues of fact as to each of its elements.

C. Negligent Misrepresentation Claims

Plaintiffs' second claim alleges that the statements of Covert and others at ESC constituted reckless or negligent misrepresentations. Under New York law, Plaintiffs may recover for negligent misrepresentation only if IBM or ESC owed them a fiduciary duty. See Stewart, 976 F.2d at 90. Employers do not owe employees fiduciary duties. See Ellis v. Provident Life & Accident Ins. Co., 3 F. Supp. 2d 399, 411 (S.D.N.Y. 1998), aff'd, 172 F.3d 37 (2d Cir. 1999). Because Plaintiffs have offered no other facts that suggest the existence of such a duty, summary judgment in favor of IBM is appropriate on this claim. See Kimmell v. Schaefer, 89 N.Y.2d 257, 263 (1996).

III. CONCLUSION

IBM's motion for summary judgment is denied with respect to the fraudulent inducement claims but granted on the negligent misrepresentation claims.

SO ORDERED.

Dated: New York, New York
October __, 2000

JOHN S. MARTIN, JR., U.S.D.J.

Copies to:

For plaintiffs:
Neal Brickman
630 Third Ave.
21st Floor
New York, NY 10017

For defendants:

Jeffrey G. Huvelle
Covington & Burling
1201 Pennsylvania Ave. NW
Washington, D.C. 20004

Richard D. Bentzen
Cerussi & Spring
1 North Lexington Ave.
White Plains, NY 10601